No. 79-1538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CECIL D. ANDRUS, Secretary of the Interior, - Appellant

versus

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al., - Appellees

On Appeal From the United States District Court
For the Western District of Virginia

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY COAL OPERATORS AND ASSOCIATES, INC.

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QUESTIONS PRESENTED

1. Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, Section 515(b) and (d), 30 U.S.C. § 1265(b) and (d) (1979), requiring mined land to be restored to its approximate original contour with all highwalls eliminated are violative of the taking clause of the fifth amendment to the United States Constitution.

2. Whether the requirement of Section 518(c), 30 U.S.C. § 1268(c) (1979), that civil penalties assessed under the Act be prepaid as a pre-condition of a hearing before an administrative law judge is violative of the due process clause of the fifth amendment to the United States Constitution.

3. Whether the provisions of Section 521, 30 U.S.C. § 1271 (1979), authorizing summary orders to cease mining without any opportunity for a pre-cessation hearing are violative of the due process clause of the fifth amendment to the United States Constitution.

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VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al. - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY COAL OPERATORS AND ASSOCIATES, INC.

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, Coal Operators and Associates, Inc., file this brief as Amicus Curiae in support of Appellees. Counsel for all parties have consented to the filing of this brief and letters to that effect from counsel for all parties have been filed with the Clerk of the Supreme Court.

Coal Operators and Associates, Inc. (hereinafter referred to as C.O.A.), is a non-profit corporation chartered under the laws of Kentucky. Although it is in form a corporation, C.O.A. is an association organized to promote the views and interests of its members. Members of C.O.A.

are 266 in number and include persons and corporations in Pike County, Kentucky, who are engaged in the active mining of coal both by surface and underground methods. Members also include persons and corporations who are dependent for their economic livelihood on the mining industry because they provide support services of all sorts for the industry. Members also include persons and corporations who are indirectly dependent upon the mining industry because they serve the needs of those employed in mining.

Pike County, Kentucky, is the leading county in the United States in terms of coal production. In 1979, Pike County was responsible for the production of some twenty-three million tons of coal. This was one-seventh of the total production for the Commonwealth of Kentucky. During the three-year fiscal period ending in 1979, severance taxes from the mining of coal in Pike County brought the Commonwealth a revenue of more than seventy-five million dollars. A significant percentage of that money was returned to Pike County by the Commonwealth under the severance tax sharing provisions of Kentucky law. Members of C.O.A. were responsible for the production of one-half of the tonnages and tax revenues just described. More than four thousand persons in and around Pike County depend directly on the C.O.A. producing members for employment. An attempt to measure the effect of C.O.A. and the coal industry on Pike County in terms of indirect effects would be fruitless. The coal industry *is* the ecomonic base of the county.

Being comprised of those who depend directly and indirectly on the mining of coal for their economic well-being, C.O.A. is directly affected by the regulation of the surface effects of coal mining imposed by the Surface Mining Con-

trol and Reclamation Act of 1917, § 101, 30 U.S.C. § 1201 et seq. (1979) [hereinafter cited as "the Act"]. It being the unanimous feeling of the members of C.O.A. that some features of the Act are so oppressive and unfair as to be unconstitutional, C.O.A. has previously contested portions of the Act in a lawsuit similar in nature to the one under appeal herein. *Clay County Independent Coal Operators Ass'n* v. *Andrus,* No. 80-8 (E.D. Ky., 1980). That action has been stayed by U. S. District Judge Eugene Siler pending the outcome of the appeal in the present case. Having presented arguments in *Clay County* which are slightly different from those previously advanced in regard to legal issues central to both *Clay County* and the present case, it is the desire of C.O.A. to advance those arguments in support of Appellees as Amicus Curiae.

SUMMARY OF ARGUMENT

I. *The requirement of the Act that all mined lands be restored to their approximate original contour with all highwalls eliminated is invalid as a taking of property without just compensation.* In the steep slope areas of Appalachia, it is physically impossible to restore to its approximate original contour in a stable fashion land which has been contour stripped. Since there is much coal which can only be mined by the contour strip method, mining of that coal is effectively precluded by the requirement that the land be returned to contour. Such coal has no economic value at all if it cannot be mined. The mineral rights in this coal have been taken without just compensation as a result of the enactment of the provisions of Section 515(b)(3), 30 U.S.C. § 1265(b)(3) (1979) and Section 515(d)(2), 30 U.S.C. § 1265(d)(2)(1979) in violation of the taking clause

of the fifth amendment. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922). Even if such mining were physically possible, economic considerations would preclude the taking of coal by either a second contour cut or by the augering method on an area restored to contour. Such economic preclusion is as much a taking of the mineral rights as if the Act prohibited such contour mining. *Id.* The requirement of restoration to contour is also a taking of the rights of surface owners of mined lands in that variance procedures are meaningless in steep slope areas and economic value of restored land is miniscule when compared with alternative post-mining land uses.

II. *The requirement of Section 518(c), 30 U.S.C. §1268 (c) (1979) that assessed penalties be prepaid as a prior condition for a hearing violates procedural due process.* Unless the facts fall within well-recognized exceptional circumstances, any significant taking of property must be preceded by an opportunity for a due process sufficient hearing. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). The requirement of prepayment of a proposed penalty in a venture capital business such as mining deprives the property owner of a property right because it unduly restricts the usage of the property even though interest will be paid on the amount in the event of a successful contest. Neither the opportunity for written input into the assessment process nor the ability to secure an informal conference with employees of the enforcement agency provides a sufficient pre-deprivation hearing. Such a deprivation violates the due process clause of the fifth amendment. The requirement of prepayment is also unduly burdensome on the right to be heard.

III. *The provisions of Section 521, 30 U.S.C. §1271 (1979) authorizing summary cessation orders are violative of due process of law.* Cessation orders under the Act fall into two categories: (1) cessation orders for failure to abate an alleged violation under Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979); and (2) cessation orders for imminent danger to the environment or to the safety and health of the public under Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979). It is essential to distinguish between the two. All cessation orders involve the deprivation of the property right to continue mining and this deprivation occurs without a prior hearing. Failure to abate cessation orders under Section 521(a)(3), are simply enforcement tools and do not fall under any of the exceptional circumstances provisions in which such summary action is consistent with procedural due process under *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Failure to abate cessation orders are further violative of due process as being unduly burdensome on the right to be heard and are in fact punitive in nature. *Ex Parte Young,* 209 U.S. 123 (1907). Cessation orders for imminent environmental harm are violative of procedural due process because none of the case law supporting such an extraordinary power under the rational of *Fuentes* has upheld such a power in regard to a concept as nebulous as imminent danger to the environment. The power to grant such cessation orders for imminent environmental harm is further violative of due process because of the lack of any definition of the terms in the Act itself. Such definitions are furnished in implementing regulations, but this cannot prevent the unconstitutionality of the Act since the regulations themselves are unconstitutionally vague.

ARGUMENT

I.

THE REQUIREMENT OF THE ACT THAT ALL MINED LANDS BE RESTORED TO THEIR APPROXIMATE ORIGINAL CONTOUR WITH ALL HIGHWALLS ELIMINATED IS INVALID AS A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

Members of Coal Operators and Associates have a variety of interests in the mineral rights to coal located under steep slopes in Eastern Kentucky. Some members are owners in fee simple of land located in such areas. Other members are owners of the mineral rights to coal underlying such land. Still others are lessees holding the right to mine coal in such areas and to derive a profit from such mining. All three categories of members are holders of a property right in the mineral interests. To the extent that the ability to mine the coal is impaired by provisions of the Act, the property rights of these owners are impaired. These mineral rights are of absolutely no value if the coal cannot be mined.

A. Approximate Original Contour and Highwall Elimination Effect a Taking of Mineral Rights in Steep Slope Areas Where Such Restoration is a Physical Impossibility.

It was found from the evidence presented to Judge Williams that in steep slope areas of Virginia which are virtually identical to Pike County, Kentucky, the requirement of the Act that land be restored to approximate original contour was impossible to obey. *Virginia Surface Mining and Reclamation Assoc.* v. *Andrus,* 483 F. Supp.

425, 441 (W.D. Va., 1980), The Act absolutely requires that all mined land be restored to approximate original contour with all highwalls eliminated. Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), and Section 515(d)(2), 30 U.S.C. §1265(d)(2) (1979). Put simply, the requirement is impossible to obey because the slopes involved are too steep for material to be restored to approximate original contour in a stable fashion. Pieces of broken rock cannot be restored to solid rock. It may be mandated by act of Congress and the regulations of the Office of Surface Mining [hereinafter "O.S.M."] that the restored material shall stay in place, but the law of gravity dictates otherwise. Faced with that dilemma, coal operators will not mine by the contour method in steep slope areas because the responsibility of restoration to contour cannot be met.

The problems encountered when mining in steep slope areas as a result of the restoration to contour requirement are not simply ones of economics. No matter how much money a person might spend or how carefully the mining might be done, the restored material will not be stable if placed in the manner dictated by the Act and so the performance standards required of an operator cannot be met. T.R. 377-410, 674-677, 840-844, 850-860. This means that large amounts of coal in which persons such as C. O. A. have a property right will not be mined so long as the contour requirement remains. T.R. 377-410, 674-77, 840-850. Although some of the coal may be mined by other methods such as deep-mining or mountaintop removal, vast reserves of the coal in Pike County and in Appalachia generally cannot be mined by any method other than that of contour mining. T.R. 771, 2540.

That coal which cannot be mined by any method other than contour mining and which cannot be mined by the

contour mining method due to the approximate original contour requirement has been taken from its owners as surely as if the United States had dug the coal from the ground and burned it. Such a deprivation of a property right by the Act without the payment of just compensation to the property owners is violative of the fifth amendment.

The Court has long struggled with the question of when a legislative scheme intrudes upon property rights to such a degree as to effect a taking of the property. A central case in the area of taking as it relates to coal mining is the landmark decision of Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922). As was observed in that case: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Since there is a level of economic burden which will effect a taking of coal interests, it clearly follows that any legislative scheme which has the practical effect of making it physically impossible to mine coal must also be a taking.

Although there have been reservations expressed in recent years as to the continued viability of *Mahon,* there would appear from recent Supreme Court treatment of the case to be no basis to doubt its continued value. This Court has cited *Mahon* with approval in its three most recent decisions involving the taking and just compensation issue. *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104 (1978); *Andrus* v. *Allard,* 444 U. S. 51 (1979); *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979). Although the cases of *Penn Central* and *Allard* have taken very restrictive views of what constitutes a taking of property, neither casts any doubt on the basic premise that it is

possible for a legislative act to so restrict property rights that a taking has been effected. That such a taking is still possible is evident from the result in *Kaiser Aetna.* The facts in *Penn Central* and *Allard* point out exactly why a taking has occurred due to the requirement of restoration to contour. In both *Penn Central* and *Allard* the property owners were left with some use of their property. In *Penn Central,* the usage which was left of Grand Central Station was not what its owners perceived to be its optimum economic use but there was an economic value left in the property nevertheless. As the Court noted in *Allard,* a taking has not occurred simply because one strand of property rights has been affected. The property value must be viewed in its entirety. *Andrus* v. *Allard,* 444 U. S. at 65-66. From the facts in *Allard,* it would appear that a property owner left with even the most minimal economic use for his property would not be deemed to have been the victim of a taking.

However, persons holding property interests in coal reserves lying under steep slopes as in Pike County have been deprived absolutely of their property right. Since the coal cannot be mined it has no economic use left. The only value of coal, as stated in *Mahon,* is in its mining and sale. Congress may choose to take this property if reasonable compensation is paid to the private property owners. Unless and until that payment is made, it must be held that the requirement of restoration to approximate original contour is an unconstitutional taking of private property without compensation and hence violates the fifth amendment.

B. Approximate Original Contour and Highwall Elimination Effect a Taking of Mineral Rights Which Could Only be Mined by the Taking of a Second Contour Mining Cut in the Future.

When a contour mining cut is taken to remove coal in an existing mining operation, the entire coal seam running through the mountain is not removed. The amount of overburden, or spoil, which may be removed to expose a coal seam is a function of economics. It is only economically feasible to remove so much overburden when mining coal. The economics are dictated by the cost of moving the overburden and the value of the coal. The deeper the cut, as measured by the height of the highwall, the greater the volume of overburden necessary to be removed in order to recover a ton of coal. Due to the steepness of the slope, the amount of overburden increases at a drastic rate while the thickness of the coal seam remains constant. The dramatic rise in the ratio of overburden to coal removed is simply a matter of the geometry of a right triangle.

The common practice of the mining industry in the past has been to leave a highwall and a bench after the removal of coal by the contour mining method. When the price of coal increases, or the cost of moving overburden decreases, more coal from the previously mined seam may be removed by the taking of a second contour cut on the previously benched area. It is also common practice in order to maximize coal recovery to remove more coal from a previously mined seam by the process known as augering.

The approximate original contour requirement eliminates altogether as being economically feasible the potential to take coal by the second cut or augering methods. While there may be a time when the economics of the

industry will allow the taking of undisturbed overburden to mine the remaining coal, there will never be a time when it will be economically possible to remove the remaining overburden plus the overburden from the first cut which will have been restored to approximate original contour as required by the Act. The only thing which makes it uneconomical to take a second cut is the approximate original contour requirement of the Act. As was noted in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 414 (1922), a provision which makes it "commercially impracticable" to mine coal has the effect of a taking of the mineral rights.

In addition to the economic infeasibility of removal of restored material to take a second cut, such removal may not be physically possible. The restored material, as found by the Court below, will not have the same stability that original materials have. T.R. 637-639, 2618-2625, 2665-2670. It is therefore a matter of some doubt as to whether heavy equipment such as that used in taking a contour mining cut will ever be able to work on a restored slope. It is further doubtful that such work can be done in a safe manner. In that case, the second cut minerals have been taken because they have been forever sealed away. Such a result has the effect of causing a taking and comes directly from the requirement of restoration to approximate original contour.

C. Approximate Original Contour and Highwall Elimination Effect a Taking of the Rights of Surface Owners Because They Unconstitutionally Diminish the Value of the Post-Mining Land Use.

The requirement of the Act that all mined lands be restored to approximate original contour is an absolute condition in steep slope areas. Although the Act does provide for a variance procedure from approximate original contour

in steep slope areas, the Act does not allow a variance from the requirement of highwall elimination. Section 515(e)(1) and (2), 30 U.S.C. § 1265(e)(1) and (2) (1979). The stability of the overburden materials used to eliminate a highwall is dictated by the laws of nature. The law of gravity and the physical characteristics (cohesiveness and compactability) of the materials used to cover the highwall establish the maximums for restoration work. In areas of steep slopes, the physical realities of restoration to eliminate the highwall will result in no flat land being left from the previously benched area despite the existence of an approximate original contour variance.

Without question, flat land in the mountainous areas of Appalachia is of tremendously greater value than sloped woodland. T.R. 696-709, 843-844. The inability of the landowner to be left with the more valuable land is a direct result of the inflexible requirement of the Act that all highwalls be eliminated. It is true that a very great diminution in the value in property can take place without reaching the level of an unconstitutional taking of the property. *Andrus* v. *Allard,* 444 U. S. 51 (1979). Yet the continued references with favor to *Mahon* in both *Allard* and *Penn Central* can only mean that there is a level of economic impairment which will be sufficient to effect a taking. The District Court below correctly found that such an impairment had taken place in regard to the post-mining configuration of land when all highwalls had to be eliminated.

II.

THE REQUIREMENT OF SECTION 518(c), 30 U.S.C. §1268(c) (1979) THAT ASSESSED PENALTIES BE PREPAID AS A PRIOR CONDITION FOR A HEARING VIOLATES PROCEDURAL DUE PROCESS.

Persons who are assessed penalties for violations alleged by O.S.M. are required by Section 518(c), 30 U.S.C. § 1268(c) (1979), to pay the full amount of such assessment into an escrow account controlled by O.S.M. before being entitled to a hearing before an administrative law judge concerning the validity of the assessment. Although there is a provision under Section 525(a)(1), 30 U.S.C. § 1275(a)(1) (1979), by which a hearing can be had without prepayment to contest the fact of the violation itself, there is no allowance under the Act for a contest of the amount assessed unless such prepayment has been made. Such pre-hearing deprivation of property is violative of procedural due process under the fifth amendment.

No aspect of procedural due process is more basic than the right to be heard. In *Windsor* v. *McVeigh*, 93 U. S. 274 (1876), Mr. Justice Fields observed concerning one of the most unpopular fact patterns of that era:

> Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. . . . A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all. . . . It would be like saying to a party, Appear and you shall be heard; and when he has appeared saying, Your appearance shall not be recognized and you shall not be heard. *Id.* at 277-78.

In *Windsor*, the Court struck down a lower court decision which had disallowed the appearance of a Con-

federate citizen. The appearance denial would have been no more acceptable had it been based on the failure of the Confederate citizen to pay to be heard. Because there are those in every age who would make Confederates of the unpopular, the Court has steadfastly maintained that "persons forced to settle their claims of right and duty must be given a meaningful opportunity to be heard". *Boddie* v. *Connecticut,* 401 U. S. 371, 377 (1971).

Any significant taking of property must be preceded by an opportunity for a hearing. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). Although the Act provides that the funds escrowed will be repaid with interest at the prevailing Department of Treasury rate in the event of a successful contest of the assessment, the prepayment requirement nevertheless constitutes a deprivation of a property right. It is settled that use rights to property are protected by the *Sniadach* requirement. *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). Thusly, the right to use the money prepaid into the escrow account during the pendency of the hearing is a protected right. Even though the operator is paid interest on his escrowed monies if he is successful at the hearing, such interest payment is inadequate because the earning of interest is only one of the usages of the funds open but for the prepayment requirement. The miner members of C.O.A., like other applicants for a hearing under the Act, are engaged in a venture capital business. Their ability to engage in that business is impaired by the prepayment requirement in view of the fact that some proposed assessments of O.S.M. have exceeded a million dollars. The prepayment requirement deprives an applicant of his choice as to how the funds are to be used pending an adjudication that the penalty is

proper. That deprivation of choice is within the protection of *Sniadach* and *Fuentes*.

The basic protections of *Sniadach* and *Fuentes* have been reaffirmed in the most recent case in the procedural due process area, *North Georgia Finishing* v. *DiChem Inc.*, 419 U. S. 601 (1975). While it is true that this line of procedural due process cases arises from the constraints placed upon actions of the States by the due process clause of the fourteenth amendment, the procedural requirement of a meaningful opportunity to be heard is equally applicable against the federal government through the due process clause of the fifth amendment. *Windsor* v. *McVeigh*, 93 U. S. 274 (1876). Neither is it significant that the persons deprived of property in the *Sniadach* line of cases were defendants while the persons deprived by the prepayment requirement are applicants for a hearing and analogous to plaintiffs. Failure of the operator to contest and prepay the proposed assessment in a timely manner will result under Section 526, 30 U.S.C. § 1276 (1979), in a final order which will then be enforced against the operator through the judicial process without further opportunity to contest the merits of the assessment. In view of those facts, "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his interest in court." *Boddie*, 401 U. S. at 376.

Without prepayment, there is no provision under the Act for any hearing sufficient in form to satisfy due process in regard to a proposed assessment for an alleged violation by an operator. It is possible without prepayment, for an operator to secure an informal conference with O.S.M. regarding the proposed assessment. 30 C.F.R. § 845.18 (1979). It is also possible, without prepayment, for an

operator to have written input in the assessment process. 30 C.F.R. § 845.17 (1979). As has been indicated in *Mathews* v. *Eldridge,* 424 U. S. 319 (1976), it is difficult to generalize about the exact form which a hearing must take in order to satisfy due process. While the pre-deprivation procedures of the Social Security Administration were held not to violate due process in *Mathews,* a comparison of the facts in that case with the procedures used by O.S.M. reveals significant differences.

Procedural due process is violated when a deprivation of a property right is preceded by a hearing process as meaningless as that afforded by O.S.M. The result in *Mathews* was tailor-made for the agency involved and to the procedures used prior to deprivations of property rights by that agency. The decision involved in a proposed assessment hearing is fundamentally different from that being made in a Social Security disability benefits termination case. In *Mathews,* the Court noted that a termination case was a "sharply focused and easily documented decision". *Id.* at 343. Such a determination was based on "routine, standard, and unbiased medical reports by physician specialists." *Id.* at 344. In contrast to that type of decision, assessments under the Act are highly subjective matters about which reasonable persons could disagree. The assessments are in fact calculated in Washington, D.C., by O.S.M. staff personnel who have not seen the mine-site and who must rely solely on written reports from O.S.M. field inspectors. The highly subjective nature of the decision is also the key to why a written submission by a coal operator prior to the assessment is not a satisfactory protection for the operator. Due to the nature of a termination case, it was noted in *Mathews* that the "spector of questionable credibility and veracity is not present".

Id. The assessment process is inherently subjective due to the various factors which must be considered under the mandate of Section 518(a), 30 U.S.C. § 1268(a) (1979). Determinations such as the seriousness of potential or actual damage to the environment cannot be said to be the same sort of unbiased determinations made by physicians in the termination case and upheld in *Mathews.* Under the Act, the original determination is made by an employee of the enforcement agency and the review at the informal conference is done by another employee of that same agency. What was present in *Mathews* is exactly what operators lack under the Act — an opportunity to have the assessment determination made by an unbiased party. In view of that lack of a sufficient hearing prior to the significant property deprivation, the prepayment requirement of Section 518(c), 30 U.S.C. § 1268(c) (1979), is violative of procedural due process.

Even aside from the pre-hearing deprivation aspect of the prepayment requirement, the provision is violative of procedural due process because it is an unreasonable burden on the process of being heard. As the states began to regulate industries at the turn of this century, legislation imposing such regulation often contained provisions making it difficult or expensive for the regulated industries to dispute the regulatory process. Such burdens were all the more imposing since they predated the availability of declaratory judgment procedures. The only means of challenge was by disobedience to the regulatory scheme and defense of the ensuing prosecution. Even that technique will not avail a coal operator since there will never be a hearing on the merits of a proposed assessment unless prepayment is made. In *Cotting* v. *Kansas City Stockyards Co.,* 183 U. S. 79 (1901), the Court expressed doubts about

the validity of a legislative scheme which "burdens any challenge thereof in the court". *Id.* at 100. Congress has burdened any attempt by an operator to contest the amount of a civil penalty assessed against him. The practice of burdening such opportunity to contest was struck down in *Ex Parte Young,* 209 U. S. 123 (1907), and *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651 (1915). Such tactics of intimidation seem to have been discontinued by all levels of government until revived by Congress in the prepayment provisions of Section 518(c), 30 U.S.C. § 1268(c) (1979).

The procedural due process rights of coal operators are violated by the prepayment requirement in that access to the hearing before a neutral judge is unduly restricted. Those who pay to overcome that obstacle are deprived of use rights in their property prior to a sufficient hearing and so are deprived of procedural due process rights. For those reasons, the provisions of Section 518(c), 30 U.S.C. § 1268(c) (1979), as they require prepayment of proposed civil penalty assessments are unconstitutional.

III.

THE PROVISIONS OF SECTION 521, 30 U.S.C. §1271 (1979), AUTHORIZING SUMMARY CESSATION ORDERS ARE VIOLATIVE OF DUE PROCESS OF LAW.

A. The Requirement of Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), for Issuance of a Cessation Order for Failure to Abate Violations is an Infringement Upon Procedural Due Process.

The Act provides that upon the finding of an alleged violation by a federal inspector, the inspector is required

to write a notice of violation, with a period specified therein during which the alleged violation is to be abated. If the alleged violation is not abated during the specified time, the inspector is required to issue a cessation order to the operator. Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). The cessation order issued under this subsection must be carefully distinguished from those issued under the authority of Section 521(a)(2), 30 U.S.C. § 1271(a)(2) (1979). Orders issued under the latter subsection are issued for imminent danger to the public or the environment; failure to abate cessation orders issued under the former section are simply enforcement tools. The cessation order for failure to abate is by definition not utilized in cases of imminent danger. This very important distinction was not noticed by Judge Williams. *Virginia Surface Mining and Reclamation Assoc.* v. *Andrus*, 483 F. Supp. at 446-47. The distinction also was overlooked by Judge Flannery in *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1319 n. 18 (D.D.C. 1979). It is essential that the two types of orders be distinguished because they are used in fundamentally different situations and involve fundamentally different constitutional questions.

As has been set forth in Part II, a fundamental requirement of procedural due process is the right to be heard *before* any significant deprivation of property occurs. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant*, 416 U. S. 600 (1974); *North Georgia Finishing* v. *DiChem Inc.*, 419 U. S. 601 (1975). A cessation order affects the property right of continuing to mine. Such an order effectively takes that property right because it requires "cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation".

Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). A hearing is available to the operator after the issuance of the cessation order, but during the interim period the operator is forced to cease operations as ordered. The procedural due process cases from *Sniadach* to *DiChem* indicate that the existence of a post-deprivation hearing process is not sufficient. Except for extraordinary situations, the requirement of procedural due process is that all deprivations of property must be preceded by an opportunity for a hearing. Pre-seizure hearings are the norm; post-seizure hearings are allowed only as an exception.

As indicated in *Fuentes,* to be an extraordinary situation and hence exempt from the pre-seizure hearing requirement, three criteria had to be met. To paraphrase those requirements: (1) the seizure must be directly necessary to secure an important governmental interest; (2) there must be a special need for very prompt action; and (3) the government must maintain a verty strict control over its monopoly of legitimate force. *Fuentes,* 407 U. S. at 91. The element which is lacking in the issuance of a cessation order for failure to abate a violation is the need for very prompt action. Very prompt action is needed when something is imminently dangerous, *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950). Such action is needed when property might be spirited away or lost. *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589 (1931); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663 (1974). If an imminent danger was involved in a mining operation, a cessation order would issue under Section 521(a)(2), 30 U.S.C. § 1271(a)(2) (1979), not under the failure to abate provisions of Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979). If the situation was dangerous, an abatement period would not have been specified in the first place. It

would follow logically that a continuation of the violation will not in and of itself have created an imminent danger, but in the event that it did there would still be the power to issue an imminent danger cessation order. Cessation orders for failure to abate would seem by their very definition not to involve any need for very prompt action. Lacking such a need, procedural due process requires that a hearing be afforded prior to the issuance of the order.

In addition to the fact that cessation orders issued pursuant to Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979), are violative of procedural due process for failure to afford a pre-deprivation hearing, the authorization for the issuance of such orders is violative of procedural due process because it impermissibly deters operators from contesting the validity of the alleged violation. An operator who has been accused of a violation may contest the existence of the violation. Section 525(a)(1), 30 U.S.C. § 1275(a)(1) (1979). At the expiration of the abatement period, it is required by Section 521(a)(3), 30 U.S.C. § 1271(a)(3) (1979) that a cessation order be issued. Such issuance may only be avoided by a determination of the Secretary pursuant to Section 518(h), 30 U.S.C. § 1268(h) (1979), that the abatement period not end until the completion of the contest on the existence of the violation. Absent an exercise of discretion by the Secretary, a failure to abate cessation order *must* be issued even if the period runs out during a contest by the operator.

The issuance of a cessation order materially changes the on-going contest between O.S.M. and the operator as to the existence of the violation. Penalties *must* be assessed whenever a cessation order is issued, unless the order were later found invalid. Section 518(a), 30 U.S.C. §1268(a) (1979). The minimum penalty per day for any continuing

violation after the issuance of a cessation order is $750.00. Section 518(h), 30 U.S.C. §1268(h) (1979). Such a cessation order has further adverse effects in that for any future violations an operator will, under the O.S.M. penalty system, be assessed a significantly greater penalty for those violations than he would be for an ordinary violation. 30 C.F.R. §845.13(b)(1) (1979).

An operator who has been issued a notice of violation is by virtue of the existence of the requirements of Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), placed in a very precarious position. He may contest the validity of the alleged violation, but runs the risk that while exercising that option his time period for abatement will expire. When the time expires, the operator will be issued a cessation order. Such order markedly increases the assessed penalty and will have the same effect on all future penalty calculations. The only other option which the operator has is to abate the alleged violation even though he feels the matter in question is not really a violation.

The placing of an operator in a position in which he must submit to what he feels is an invalid order or run the risk of greatly increased penalties and more serious consequences by litigating his claim is violative of due process. As was noted in *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651, 662 (1915): "If a statute could constitutionally impose heavy penalties for violations of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment. . . ." In the landmark case of *Ex Parte Young,* 209 U. S. 123 (1907), Mr. Justice Peckham observed:

> It may therefore be said that when the penalties for disobedience are by fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. *Id.* at 147.

This is exactly the effect of the cessation order for failure to abate. By its mandatory penalty, by the high dollar amount of that penalty, and by its higher point value for future violations, the availability of the order serves to deter persons from contesting the allegations of a federal inspector concerning an alleged violation.

Failure to abate cessation orders as authorized by Section 521(a)(3), 30 U.S.C. §1271(a)(3) (1979), are violative of procedural due process for two reasons. First, such orders cause a deprivation of property without a prior hearing. Second, such orders further have the effect of forcing operators to comply with the remedial provisions of notices of violation rather than contesting the validity of the notice itself. The imposition of a barrier to a person's option of contesting the existence of the violation itself is violative of procedural due process.

B. The Provision of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), Allowing Issuance of Cessation Orders for Imminent Environmental Harm is Violative of Procedural Due Process.

The provisions of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorize O.S.M. to issue summary cessation orders without hearings in two separate situations of imminent danger. The first is in cases of imminent danger to the health or safety of the public; the second is in cases of

imminent environmental harm. Without distinguishing between the two situations, the power granted under this subsection of the Act has been upheld as constitutionally valid by Judge Flannery in *In Re Surface Mining Regulation Litigation,* 456 F. Supp. 1301, 1319-21 (D.D.C. 1979). A solid body of case law, as well as sound social policy, allows the existence of the power to order such summary cessation in the case of imminent danger to the health or safety of the public. A careful distinction must be drawn between the two situations contemplated by the Act, however, because neither case law nor sound policy allows the exercise of such a power for imminent environmental harm.

As has been identified in Part III(A), above, the issuance of a cessation order constitutes a deprivation of a property right because it requires a cessation of mining activities. This is a deprivation which takes place without a hearing. Pre-hearing deprivations are, under current standards of procedural due process, the exception rather than the rule. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant,* 416 U. S. 600 (1974); *North Georgia Finishing* v. *DiChem Inc.,* 419 U. S. 601 (1975). For a power such as that granted by Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), to be valid, it would have to fall within the extraordinary situations exception of *Fuentes.*

In the case of imminent danger to the environment, there is missing the essential element of *Fuentes* that the situation call for very prompt action. None of the cases normally cited as calling for a special need for very prompt action involve the concept of environmental harm. *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663 (1974), involved the pre-hearing seizure of a ship carrying contraband, a situation in which the need to secure the contra-

band was obvious. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950), upheld a pre-hearing seizure of mislabeled vitamins, a case in which the danger to the public of a failure to take prompt action is clear. While it is true that the cases do uphold the availability of prehearing deprivations to protect the public health or safety, there is no decision of the United States Supreme Court upholding such authority for situations of imminent danger to the environment.

Despite the fact that there is sound policy to uphold summary powers to protect the public, there is no such policy applicable to the environment. Indeed, sound policy would dictate that such decisions be postponed until an opportunity for a hearing has been afforded. Courts have upheld the granting of powers to summarily infringe upon property rights in cases of danger to health or safety because these are concepts with which reasonable people are familiar. The sheer number of cases would indicate that the legal system is familiar with assessing such dangers to persons. There is no similar body of case law with which to assess danger to the environment. Neither is the concept of danger to the environment something about which reasonable persons would agree in all cases. In a very real sense, all life and all activities are potentially harmful to some aspect of the environment. Absent any clear ability to define the concept of danger to the environment, sound policy dictates that any exception to the normal rule of pre-deprivation hearings not be extended to cover such cases. Since prehearing deprivations are the exception, it is best to limit such exceptions to those cases in which the necessary determinations may more readily be made. The difficulty outlined here in applying the nebulous con-

cept of danger to the environment is exacerbated by the fact that this is a concept which is not defined by the Act itself.

C. The Provision of Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), Allowing Issuance of Cessation Orders for Imminent Environmental Harm is Violative of Substantive Due Process Because it is Impermissibly Vague.

In the event that it is found that power exists to authorize summary cessation orders for imminent environmental harm without violating procedural process, it would still be the case that such power as is contained in the Act is violative of due process because that subsection of the Act is unconstitutionally vague. While the concept of due process as a control of vagueness is most often encountered in the area of criminal statutes, the basic principle has been said to apply to civil cases as well. "The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application in civil as well as criminal legislation." *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463 (1926). The Act does define in Section 701(8), 30 U.S.C. §1291(8) (1979), the meaning of "imminent danger to the health and safety of the public" as that term is used in Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorizing summary cessation orders. No similar definition is contained in the Act for "significant, imminent environmental harm to land, air or water resources" as that term is used in Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), authorizing summary cessation orders for imminent environmental harm.

An attempt has been made by O.S.M. to correct the statutory lack of a definition of the essential concept of

imminent environmental harm by utilizing the agency's power to formulate regulations. A definition of the term appears in the Federal Permanent Program Regulations at 30 C.F.R. §701.5 (1979). Certainly, without the gloss of any regulatory definition, the term as used in the Act would be impermissibly vague since the concept is so broad as to lack any guidance at all for federal enforcement personnel. The lack of a definition of the concept in the Act leaves its interpretation to the whims of the Secretary in the regulation process and renders that portion of the Act void for vagueness. Even with a definition of the term provided by regulation, such an attempt to place a gloss on the statute so as to render it constitutional is impermissible. The absence of sufficient notice on the face of the Act renders it unconstitutional on its face. *Wuchter* v. *Puzzutti,* 273 U. S. 13 (1928).

Even if it were correct that regulations could sufficiently clarify the Act so as to protect this subsection from being void for vagueness, no definition of environmental harm such as that contained in 30 C.F.R. §701.5 (1979) of the Permanent Program Regulations would be sufficient to salvage this portion of the Act. Within the definition of the concept as set out in the regulation there are terms so nebulous that they give the regulated parties no real notice of the conditions which will justify issuance of a cessation order. In addition to lacking clarity for the regulatees, the definition in the regulations is so broad that it provides no real guidance for federal inspectors as to when such cessation orders should be issued. This leaves field personnel of O.S.M. with virtually unlimited discretion in the process of deciding whether to issue a cessation order for imminent environmental danger. The usage of such terms as "any

adverse impact" and "appreciable and not immediately reparable" in 30 C.F.R. §701.5 (1979) of the regulations provide no solid guidance either to the industry or to inspectors. It is a basic premise of due process that citizens must be protected from the arbitrary and capricious acts of government. *Nebbia* v. *New York,* 291 U. S. 502 (1934).

As has been suggested in Part III(B), above, it is essential to draw a distinction between those summary cessation orders which may be issued for danger to the public and those which may be issued for danger to the environment. In cases of danger to persons or property, the matter is such that any reasonable person might recognize them; in addition there is ample case law to provide review of the correctness of such decisions. In the case of danger to the environment, the concept is in and of itself too vague to proceed without definitive guidelines. In this respect, the Act is deficient on its face. Even the regulations promulgated to remedy the defect are too vague to provide guidance. In the face of such deficiencies, it can only be concluded that Section 521(a)(2), 30 U.S.C. §1271(a)(2) (1979), as it authorizes cessation orders for imminent danger to the environment is void for vagueness.

CONCLUSION

For the foregoing reasons, Amicus contends that the challenged provisions of the Act, are violative of the basic constitutional rights of persons such as Amicus. While the preservation of the environment from the adverse effects of mining is a legitimate legislative aim, no program may be implemented which is violative of the United States Constitution. Elimination of the challenged provisions from the Act will leave a regulatory framework that is capable of protecting the environment, but not at the unreasonable expense of the rights of the regulated parties. For these reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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